SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioner,

-against-

AMERICAN INTERNATIONAL GROUP, INC., AMERICAN GENERAL ASSURANCE COMPANY, AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY OF DELAWARE, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK, CHARTIS PROPERTY CASUALTY COMPANY, CHARTIS SELECT INSURANCE COMPANY, COMMERCE AND INDUSTRY INSURANCE COMPANY, FIRST SUNAMERICA LIFE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INSURANCE COMPANY, SUNAMERICA ANNUITY AND LIFE ASSURANCE COMPANY, SUNAMERICA LIFE INSURANCE COMPANY, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, THE VARIABLE ANNUITY LIFE INSURANCE COMPANY, and WESTERN NATIONAL LIFE INSURANCE COMPANY (collectively "AIG") (proposed intervenors),

Respondents,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

VERIFIED PETITION TO INTERVENE

The proposed intervenors named above (referred to collectively in this Petition as "AIG"), through their attorneys Reilly Pozner LLP, petition pursuant to CPLR §§ 401, 1012, and 1013 to intervene as respondents.

I. Introduction

The Bank of New York Mellon ("BoNY") and a minority of so-called Institutional Investors painstakingly devised and implemented a plan to foist a settlement of which they obviously approve on other trust beneficiaries in a manner that prevents other beneficiaries from evaluating whether the proposed settlement is in their best interest. These settlement proponents had nine months and an abundance of information with which to make their decision yet they seek to limit everyone else to 60 *days* and virtually no information with which to make theirs. The proposed intervenors, collectively referred to herein as AIG, own certificates in 97 of the at-issue trusts and are within the majority of trust beneficiaries who are outsiders to the settlement process.

According to BoNY and the Institutional Investors' plan, any beneficiary who fails to opt in to this proceeding by August 30, 2011 loses her or his right to object or otherwise participate. By this, BoNY and the investors create an electoral fiction by asserting that anyone who fails to opt in necessarily approves of the proposed settlement. There is no basis to make that assumption especially when, at the same time, they adamantly resist making the very information on which they relied available to anyone else. Moreover, the proposed settlement is not up for a vote. Rather, the standard suggested by BoNY and the Institutional Investors is whether the trustee has acted reasonably. The proposed settlement is presumptively unreasonable because of BoNY's self-dealing in the process by which it was entered. The settlement terms and proffered justifications also show that Bank of America is drastically underpaying on its liability.

As set forth below, the proposed settlement and the resort to Article 77 for approval were the product of a highly-conflicted process in which BoNY as trustee engaged in disparate treatment of trust beneficiaries, engineered for itself releases from the very beneficiaries who had

no meaningful access to information, and gave undue deference to Bank of America's defenses. As a trustee, BoNY should be aggressively prosecuting Bank of America instead of proposing a pennies-on-the-dollar settlement to its beneficiaries.

BoNY cannot be relied upon to adequately represent the interests of AIG and other beneficiaries. It has done too little over the years during which it was supposed to be acting as a trustee and has too much to gain in the proposed settlement. Even the New York Attorney General ("NYAG") has come out strongly against BoNY, suing BoNY in this proceeding for breach of fiduciary duty and fraud in its role as a trustee for AIG and other beneficiaries. The NYAG has also stated that Bank of America may face liability for aiding and abetting BoNY's breach of fiduciary duty with respect to the settlement negotiations, and that Bank of America and Countrywide face liability for violating the Martin Act and Executive Law 63(12)'s prohibition on "persistent illegality" with respect to breaches of representations and warranties and misconduct in servicing the loans in the trusts.

The Institutional Investors' lawyers are also highly motivated to promote the proposed settlement, as they will be paid $85 million if it is approved. What is more, this attorney's fee payment (which would traditionally come from the attorney's client) would come from Bank of America, the very party who is liable and who, it would seem, must be more than satisfied with the proposed settlement amount if its is willing to pay opposing counsel such an enormous sum to champion it. This process could hardly be more contrived.

In order to ameliorate the substantial prejudice to trust beneficiaries that flows from BoNY's plan to force beneficiaries to decide whether to object before having access to sufficient information on which to make that decision, especially now, in light of the allegations made in the NYAG's lawsuit, the Court should set a post-discovery deadline for objections. Beneficiaries

must have access to critical information regarding such matters as (a) Bank of America's total liabilities, (b) BoNY's performance and non-performance of its duties as trustee, (c) how different assumptions were reached, (d) the history and particulars of settlement negotiations, including with respect to BoNY's releases and indemnification, and (e) how Bank of America's payment of Gibbs & Bruns' fee came about.

Furthermore and as set forth below, AIG is entitled to intervene because BoNY is seeking court approval of a proposed settlement by which BoNY seeks to extinguish critical legal rights of AIG and thousands of other trust beneficiaries. AIG was not given the opportunity to participate in the settlement discussions in a meaningful or timely fashion. AIG has a bona fide interest in this proceeding as its rights: (1) are not and will not be adequately protected by the parties to this proceeding and (2) will be adversely affected by the relief sought. AIG requests that the Court grant AIG leave to intervene to protect its interests.

II. Background

1. BoNY accepted responsibility and was paid for being the trustee of 530 trusts created by Countrywide Home Loans, Inc., and its affiliates ("Countrywide"), which since merged into Bank of America ("BAC"). The trusts own hundreds of thousands of mortgage loans created or acquired by Countrywide during the mortgage boom of the mid-2000s. The monthly mortgage payments on the loans were to flow into the 530 trusts for distribution to the thousands of trust beneficiaries. It is unquestioned that Countrywide originated and sold massive numbers of defective loans which did not produce the intended flow of funds into the trusts. According to the so-called Institutional Investors,[1] the trusts and their thousands of beneficiaries

[1] BoNY and this exclusive group of beneficiaries label the group "Institutional Investors." This designation is somewhat inaccurate in that it implies there are no other institutional investors (there are in fact many) and also some of this group are asset managers (who may not even actually be investors). This group would be more aptly named "inside beneficiaries" (since they

have suffered and will suffer monumental financial losses, projected by some estimates to total nearly $108 billion. AIG is one of thousands of beneficiaries which has and will continue to incur financial losses. AIG owns certificates in 97 of these trusts. Affirmation of Michael A. Rollin ¶ 4.

2. Whether the losses amount to $108 billion or another number based on different assumptions, there is no doubt that Countrywide and its successor, BAC, have significant liability to the trusts and their beneficiaries in connection with the projected losses. As an investor in many of the trusts, AIG suffered harm caused by the failures of Countrywide and BAC to meet their legal obligations.

3. BoNY initiated this Article 77 proceeding to obtain judicial approval of a proposed settlement agreement with BAC. The agreement BoNY proposes would recover only a small percentage of the projected losses for the thousands of beneficiaries. While BoNY thus far has refused to turn over loan files or other information so that a thorough analysis of these losses can be conducted, expert analyses of publicly available information reveal that a significant majority of the losses are attributable both to Countrywide's generation of loans that did not comply with the quality and characteristics required by the trust agreements and to BoNY's and BAC's subsequent failure to take action to fulfill their duties to the trust beneficiaries.

4. The genesis of the proposed settlement agreement appears to be an exclusive group of investors and their outside counsel, who without the participation of the other beneficiaries and with the blessing and cooperation of BoNY as trustee engaged in clandestine

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were actually participating in the settlement negotiations) as contrasted with "outside beneficiaries" like AIG and all of the other thousands of beneficiaries who were excluded from the settlement negotiations and the receipt of purportedly confidential information regarding them. Therefore, for the ease of the Court's reference and to make appropriate distinction between which parties were included and which were excluded from the settlement negotiations, AIG will refer to the insiders as "Inside Institutional Investors."

settlement negotiations with BAC. These discussions culminated in a settlement proposal that, if approved, would result in thousands of affected beneficiaries receiving a small fraction of their losses, while the Inside Institutional Investors' outside counsel would be paid $85 million – not from her clients but from BAC. These three groups (BAC, BoNY as trustee, and the Inside Institutional Investors) then entered in to a three-party confidentiality agreement which blocks AIG and the other excluded beneficiaries from having access to critical information necessary to evaluate the settlement agreement and the negotiations that led to it. As a consequence of this agreement, the Inside Institutional Investors have had access to settlement-related information that is now being withheld from outsider beneficiaries like AIG. This group has also intervened in this Article 77 proceeding without opposition from BoNY. This group enjoyed a privileged and exclusive place at the negotiating table compared to thousands of other beneficiaries, AIG included, who were kept in the dark by BoNY and the Inside Institutional Investors. There is no legal or equitable support for awarding this group the special privileges of access or participation it was granted.

5. The settlement agreement BoNY asks this Court to approve will extinguish critically-important rights of AIG and all other beneficiaries of the residential mortgage-backed securities ("RMBS") trusts, including but not limited to the right to have BoNY put-back defective loans against BAC for violations of the trust agreements. The approval BoNY asks from this Court may also release BoNY from liability related to its performance or non-performance as a trustee, and will release BoNY for its role in the proposed settlement.

6. The proposed settlement appears to suffer from numerous flaws, including:

(a) <u>The proposed settlement is the product of a highly conflicted process</u>

- BoNY admits that it "finds itself squarely in the middle of conflicts among Certificateholders" who have directed the trustee to take

different actions and who do not support the proposed settlement and are "looking to remedy alleged breaches in different ways."

- Despite this admitted conflict of interest, BoNY has chosen to support the proposed settlement which is supported only by the Inside Institutional Investors.

- As part of the proposed settlement BoNY has obtained a release from certain claims the trust beneficiaries may bring as well as expanded indemnification from BAC.

- Counsel for the Inside Institutional Investors will be paid $85 million in legal fees from BAC upon approval of the settlement.

(b) <u>The proposed settlement is a fraction of the $108 billion in losses assumed by the Inside Institutional Investors</u>

- Based upon certain assumptions, the Inside Institutional Investors assumed that the various trusts have and would suffer losses in an amount of $108 billion.

- Accepting for present purposes the Inside Institutional Investors' loss assumption, the $8.5 billion proposed settlement is a dramatic reduction from the $108 billion in losses that the Inside Institutional Investors believe the trusts have or will incur.

- BoNY appears to have accepted, without challenge, BAC's assumptions – including breach rates, success rates, and predictions on successor liability – to drive down the settlement value to a mere $8.5 billion.

- BoNY also adopted loss assumptions much smaller and much more favorable to BAC than the Inside Institutional Investors' assumption of $108 billion.

- The negotiation process by which BoNY got to $8.5 billion is entirely opaque.

- There has been no allocation of the $8.5 billion across the 530 trusts, so neither the trusts nor the trust beneficiaries have any understanding of what they would receive.

(c) <u>The proposed approval process deprives individual trusts and trust beneficiaries of their due process rights and is fundamentally unfair</u>

- The proposed settlement suffers from a serious structural defect in that it provides no opt-out mechanism for either individual trusts or individual trust beneficiaries.

- There is no precedent for using Article 77 to approve a settlement in the RMBS trust context and BoNY/BAC's attempted use of Article 77 may be improper.

7. This Court and the trust beneficiaries, including AIG, should be provided with complete information regarding the proposed settlement and a timetable should be set by the Court that will allow trust beneficiaries a meaningful opportunity to analyze the information adduced before deciding whether to object. Only after the basis for the proposed settlement and the process engaged in to reach the full settlement are completely transparent can anyone make an *informed* decision on BoNY's petition for judicial approval thereof. AIG is particularly well-positioned to develop the factual and legal record for the Court in a streamlined and targeted fashion. AIG has a stake in a large number of the trusts, has closely examined the issues, and has significant RMBS litigation experience.

8. "Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action." *Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dep't 2010). CPLR 1012 sets forth the standard for a party to intervene as of right, and CPLR 1013 establishes the standard for permissive intervention. "As a practical matter, however, under liberal rules of construction the distinctions between the two forms of intervention are not important." *Plantech Housing, Inc. v. Conlan*, 74 A.D.2d 920, 921 (2d Dep't 1980); *accord Yuppie Puppy Pet Prods.*, 77 A.D.3d at 201. "Thus, it has been said that where the intervenor has a real and substantial interest in the outcome of the proceeding, intervention should be allowed." *Plantech Housing*, 74 A.D.2d at 921. Under any standard, AIG should be allowed to intervene.

9. Accordingly, AIG respectfully requests that the Court grant its Petition to Intervene so that AIG may propound and conduct discovery that will allow full transparency regarding the proposed settlement, and to protect its interests on equal footing with other parties.

III. BoNY's Trustee Responsibilities, Violations, And Admitted Conflicts Of Interest

A. BoNY Has Fiduciary, Contractual, And Implied Duties To AIG Because BoNY Is A Trustee Of 97 Express Trusts Of Which AIG Is A Beneficiary

10. BoNY brings this action under CPLR Article 77, which applies to express trusts. BoNY pleads that the 530 trusts subject to this proceeding are express trusts. Doc. 12 at 11-12. AIG owns certificates in 97 trusts and is therefore a beneficiary. As trustee of express trusts, BoNY owes beneficiaries such as AIG fiduciary duties that cannot be contractually negated. *In re IBJ Schroder Bank & Trust Co.*, 271 A.D.2d 322, 322 (1st Dep't 2000); *United States Trust Co. of New York v. First Nat'l City Bank*, 57 A.D.2d 285, 295-96 (1st Dep't 1977).

11. BoNY's fiduciary duties require it to deal with AIG with utmost fairness and fidelity. Chief Judge Cardozo famously described the duty of loyalty as follows:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Meinhard v. Salmon, 249 N.Y. 458, 464 (1928) (Cardozo, C.J.) (citations omitted). "This inflexible duty of loyalty prohibits a trustee from even placing himself in a position of potential conflict . . . where his every act is above suspicion." *Sankel v. Spector*, 33 A.D.3d 167, 172 (1st

Dep't 2006). The duty of loyalty is a fundamental common-law duty of trustees. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003).

12. BoNY's fiduciary duties also include the obligation to preserve trust assets. *See In re Gurlitz' Will*, 134 Misc. 160, 161 (N.Y. Sur. 1929) ("[O]ne of the primary duties of a trustee is to conserve the property and assets of the trust estate . . . ."). A trustee must care for trust assets as persons of ordinary prudence would treat their own assets. *See* George Gleason Bogert et al., *The Law of Trusts and Trustees* § 582 (3d ed. 2010) (citing New York law).

13. BoNY also has specific contractual duties to trust beneficiaries like AIG. Each of the 97 trusts is governed by a trust agreement (known as a Pooling and Servicing Agreement or "PSA" or "trust agreement"). The trust agreement is between and among Countrywide (now BAC) entities as depositor, seller, and master servicer, together with BoNY, as trustee. Under the trust agreements, BoNY was required, among other things, to:

- Ensure that the trust *res*—mortgages—were properly conveyed into the trusts by ensuring that all necessary documentation was present, in the form required by the trust agreement, and appearing regular on its face. Ex. 1 [sample PSA] §§ 2.01; 8.01.

- Identify and report any deficiencies in required documents 90 days after closing so that Countrywide would cure, replace, or repurchase inadequately documented loans. *Id.* §§ 2.02; 8.01.

14. As keeper of these trusts, BoNY's contractual documentation-related duties are critically important to protecting the value of the trusts by ensuring that the mortgages were properly conveyed into the trust. It recently was held that irregularities in the chain of documentation that BoNY was supposed to have verified precluded BoNY, as owner of the mortgage, and Countrywide, as servicer, from enforcing a mortgage note. *In re Kemp*, 440 B.R. 624 (Bankr. D.N.J 2010); *see also* Doc. 101-2 (Verified Petition of the New York Attorney

General) ¶ 31 (showing BoNY's failures to ensure proper conveyance of mortgage loans into trusts and BoNY's notice thereof).

15. Mortgage loan documentation deficiencies are also indicia of potential breaches of representations and warranties. BoNY, as the party responsible for creating and providing to Countrywide the document exception reports, was in the best position to identify and prevent loss from defective loans at a time when it had the right to demand cure, replacement, or repurchase. Based on the timeline established by the trust agreements, BoNY would have been able to remedy defects in the first 6 to 18 months after securitization, *before* the trusts suffered massive losses from subsequent defaults.

16. BoNY had additional contractual duties in the case of an "Event of Default" under the trust agreements. An Event of Default is when the master servicer (Countrywide originally or Bank of America as successor) breaches certain of its obligations, as set forth in the trust agreement. When that happens, BoNY is required to exercise its rights and powers under the trust agreements, "and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs." Ex. 1 § 8.01. An Event of Default would also give rise to additional rights and obligations of BoNY, including the right (and sometimes the obligation) to terminate the master servicer and undertake its duties or appoint a successor (*id.* §§ 7.01, 7.02), and the obligation to send notification of the Event of Default to trust beneficiaries 60 days after its occurrence (*id.* § 7.03).

17. Mechanically, one of the ways in which an Event of Default occurs is where the master servicer (a BAC entity) fails "to observe or perform in any material respect any of [its contractual duties], which failure materially affects the rights of Certificateholders . . . and continues unremedied for a period of 60 days after the date on which written notice of such

failure shall be given to the Master Servicer and the Trustee by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates . . . ." Ex. 1 § 7.01(ii). An Event of Default by Bank of America as master servicer appears to have occurred on or about December 17, 2010, described in more detail *infra*.

18. Finally, BoNY has the duty to enforce breaches of representations and warranties against BAC for the benefit of trust beneficiaries. Doc. 1 ¶¶ 51-57; Doc. 12 at 7-8. Having undertaken this duty, BoNY must perform with utmost loyalty to the interests of trust beneficiaries both as a fiduciary (discussed *supra*) and under the duty of good faith and fair dealing implied in every contract. *See 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002).

B. BoNY's Apparent Breaches Of Its Fiduciary And Contractual Obligations

FIRST APPARENT VIOLATION: BoNY proceeds in the face of conflicts among beneficiaries to join with a select group of beneficiaries in negotiating a settlement that would bind all beneficiaries.

19. BoNY concedes that it has "real and substantial conflicts" because different groups of trust beneficiaries want BoNY to resolve BAC's RMBS liability differently and may take action against BoNY for its role in the proposed settlement. Doc. 1 ¶¶ 13-16. In fact, BoNY acknowledges that "[a]bsent instructions from the Court, the Trustee will continue to be subject to conflicting demands from different [trust beneficiaries] relating to the same Trusts, and to requests from different [trust beneficiaries] to pursue claims that are intended to be released by the Settlement Agreement." *Id.* ¶ 15. BoNY's petition reads as though this were a recent development. It is not. BoNY has been presented with beneficiary demands for action at least since August 2010, when The Baupost Group LLC – a hedge fund – sent two letters to BoNY. *See* Index No. 650497/2011, Doc. 39 [Countrywide's Motion to Dismiss claims of the Walnut

Place entities] at 7-8; *see also* Ex. 2 [Gibbs & Bruns Letter] (showing a separate demand on October 18, 2010). Indeed, BoNY has already been sued by two trust beneficiaries. Doc. 1 ¶ 14; *see also* Doc. 12 at 13 (noting that even a potential conflict is grounds for judicial instruction). Additionally, since August 2010 AIG itself has repeatedly requested that BoNY obtain individual loan files for many of the trusts covered by the proposed settlement so that AIG could investigate the full extent of the breaches that have occurred. In each instance, BoNY refused to request the loan files leaving AIG unable to further investigate potential liability.

20. Presented with these actual and potential conflicts among trust beneficiaries, as early as last fall BoNY could have initiated an Article 77 proceeding to seek judicial guidance from this Court as to how to proceed with the conundrum it faced. Rather than recusing itself from settlement negotiations and seeking guidance from this Court, beginning last November, BoNY joined forces with the Inside Institutional Investors to conduct joint negotiations with BAC. Doc. 1 ¶ 35. Ironically, at the same time BoNY was participating in negotiations with the Inside Institutional Investors and BAC, BoNY rejected AIG's demands for information that would allow it to determine whether and to what extent to pursue remedies, whether directly or via demand on the trustee. It appears that while BoNY refused AIG's request, citing a purported requirement that 25% of the trust beneficiaries must direct the trustee's actions, BoNY was taking direction from the Inside Institutional Investors without regard to the fact that they lacked the 25% ownership in many of the trusts at issue in the proposed settlement.

21. Meanwhile, with actual knowledge of its real and substantial conflicts, and during an Event of Default, BoNY as trustee negotiated with BAC for *seven months* in "dozens of face-to-face meetings and conference calls . . . involv[ing] extensive dialogue" (Doc. 1 ¶ 35) without bringing this proceeding to resolve its "real and substantial conflicts." AIG was not given a

meaningful or timely chance to participate in these settlement discussions. BoNY does not bring this proceeding to *resolve* its conflicts, as it pleads, but to have the Court retroactively ratify its decision to conduct and complete negotiations *notwithstanding* its conflicts.

SECOND APPARENT VIOLATION: BoNY is conflicted as it seeks an exculpatory clause for itself.

22. BoNY has argued that it has nothing to gain by the proposed settlement and therefore the Court should defer to its discretion. Doc. 12 at 15 – 16. This is simply not true. BoNY advocates for a settlement in which it has much to gain, including a far-reaching release from all of its beneficiaries, including those who have not been allowed to participate in the settlement negotiations or decision-making.

23. BoNY did not include a release for itself in the settlement agreement but added one to the proposed Final Order and Judgment, as if no one would look there (and it is worth noting that it was not in the section on releases). The release BoNY as trustee seeks reads:

> All Trust Beneficiaries and each of their heirs, executors, administrators, successors-in-interest, and assigns . . . are hereby permanently barred and enjoined from instituting, commencing, or prosecuting, either directly, derivatively, or in any other capacity, any suit, proceeding, or other action asserting against the Trustee any claims arising from or in connection with the Trustee's entry into the Settlement, including but not limited to the Trustee's participation in negotiations regarding the Settlement, the Trustee's analysis of the Settlement, the filing by the Trustee of any petition in connection with the Settlement, the provision of notices concerning the Settlement to Potentially Interested Persons, and any other actions by the Trustee in support of the Settlement, including the response by the Trustee to any objections to the Settlement and any implementation of the Settlement by the Trustee; provided, however, that nothing herein precludes any Party from asserting any claims arising out of a breach of the settlement agreement.

24. Further, on its face, the release appears to relate only to BoNY's role in settlement-related activities, but AIG is concerned that in a suit against BoNY for its failures as a trustee over the past years, BoNY will argue that the release covers those acts or omissions, as

well. Phrases like "arising from" and "in connection with" can be read too broadly. Were BoNY not using the settlement process to secure benefits for itself, this would not be an issue.

25. BoNY's attempt to get for itself a release from trust beneficiaries with whom it did not negotiate for a release, to whom it neither offered nor provided consideration, and who BoNY argues need not be allowed to intervene in this proceeding appears to be motivated by self-interest contrary to its obligations as a trustee.

26. Recognizing that trust beneficiaries may sue anyway, BoNY seeks to obtain for itself indemnification from BAC broader that it would have been entitled to under the trust agreements. Under the trust agreements, BoNY would not have been entitled to indemnification for its actions taken and/or omissions to act in response to the October 18, 2010 letter from the Inside Institutional Investors (Ex. 1 § 3.05), which, 60 days later, triggered an Event of Default and heightened trustee duties under the trust agreements. But, in a side letter to the proposed settlement agreement, BAC agrees not to construe "any letter or other correspondence from the investors or their counsel which requests that the Trustee take the Trustee Settlement Activities, or any portion thereof" (which would include the October 2010 letter) as "the equivalent of a direction for purposes of the Indemnity." Doc. 3, Ex. C [Side Letter] at 2-3. (The Inside Institutional Investors went along by sending a new letter, dated June 23, 2011 stating that their letter is not a "binding instruction" from trust beneficiaries. Doc. 3, Ex. D [Investor Letter] at 2.) This is an important benefit to BoNY because it effectively insulates BoNY from its failure to perform some or all of the duties triggered by this apparent Event of Default and is beyond the scope of BoNY's rights to indemnity under the trust agreements. Any argument by BoNY or the Inside Institutional Investors to the contrary, *see, e.g.*, Doc. 43 at 5 – 6, is incorrect. This is another instance of BoNY acquiring a benefit from the proposed settlement. Whatever

consideration BAC is willing to pay for the settlement should go to trust beneficiaries, not BoNY.

27. Additionally, BoNY has a significant ongoing business relationship with BAC that, as a result, further calls into question BoNY's purported impartiality and the proper discharge of its fiduciary duties.

28. Under New York law, a trustee's self-dealing will not be enforced: rather, a court "stops the inquiry when the relation is disclosed and sets aside the transaction or refuses to enforce it." *City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 132 (1943). At a minimum, BoNY is entitled to no deference, as even its Petition acknowledges that a trustee acting in furtherance of his own interests acts with improper motive. Doc. 12 at 15 (citing Restatement (Second) of Trusts, § 187, cmt g (1959)).

THIRD APPARENT VIOLATION: BoNY and its favored beneficiaries refuse to provide settlement-related information to AIG and other outsider beneficiaries.

29. BoNY and the Inside Institutional Investors have created a unique relationship: together, they negotiated the proposed settlement; the insiders helped BoNY get expanded indemnification from BAC by writing the June 23, 2011 letter; BoNY has agreed to the Inside Institutional Investors' intervention in this proceeding; and together they entered into an unusual three-party confidentiality agreement designed to block outsider beneficiaries' review of the settlement-related information.

30. To actually locate the three-party confidentiality agreement one has to read both the proposed settlement agreement and the Institutional Investor Agreement. The settlement agreement says: "All matters relating to the negotiation of this Settlement Agreement, including confidential information exchanged between any Parties hereto in connection with the

negotiation, other than the Settlement Agreement and the Institutional Investor Agreement, shall be and remain confidential . . . ." Doc. 3 [settlement agreement] ¶ 17. The "Parties" are defined as BoNY and BAC. *Id.* ¶1(j).

31. Then, BoNY and BAC entered into a side agreement with the Inside Institutional Investors called the Institutional Investor Agreement, pursuant to which the Inside Institutional Investors signed on to the confidentiality provision of the settlement agreement: "Paragraph 17 of the Settlement Agreement is specifically incorporated herein and the Inside Institutional Investors agree to be bound by that paragraph in its entirety as if they were parties to the Settlement Agreement." Doc. 4 ¶ 11. Thus, the Institutional Investor Agreement creates two classes of trust beneficiaries: insiders and outsiders. One class has unfettered access to settlement-related information; the other does not.

32. As discussed above, BoNY has previously refused AIG's requests that BoNY obtain loan files so that AIG may review those files for potential breaches. BoNY refused AIG's requests on the basis that AIG's requests did not "conclusively state that AIG holds the requisite amount of Certificates or Percentage Interest to be able to direct the Trustee to act under the various PSAs or Trust Agreement." Ironically, BoNY is now supporting a settlement that would release some of the very breaches that AIG sought to investigate. And, BoNY continues to refuse to provide documents necessary to evaluate this settlement. Similarly, BoNY has revealed precious little information about how the proposed settlement was negotiated among the various parties and has revealed equally scant information concerning BoNY's evaluation of the proposed settlement. As discussed below the "expert" opinions on which BoNY relied raise more questions then they answer. From AIG's perspective, and presumably from the perspective

of everyone other than the parties involved in the settlement negotiations, the basis for settlement remains a black hole.[2]

33. Certainly neither the trust beneficiaries nor the Court can be expected to evaluate the proposed settlement without being provided this basic information. The law entitles AIG (like all other trust beneficiaries) to the information it needs to evaluate its rights under the trust agreements and other applicable law, or to consider whether the proposed settlement agreement was entered in good faith and is reasonable. *See* Restatement (Second) of Trusts § 173 (1959) ("The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust."). Even if the trust agreements limited the amount of information BoNY was required to provide to the trust beneficiaries, AIG is entitled to the information it seeks here to protect its interests. *See id.* cmt. c ("Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, *the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust*.") (emphasis added). By affirmatively seeking the blessing of this Court for its actions, BoNY has plainly put at issue the information necessary for AIG to evaluate the strength of its claims against Countrywide (and later BAC) as well as BoNY as trustee.

[2] BoNY's failure to provide information (both the loan files as well as settlement information) also demonstrates that BoNY is treating trust beneficiaries in an unequal manner in contravention of its fiduciary duties. Assuming that BoNY was not required to turn over loan files unless 25% of the voting certificates demanded action on those trusts, and assuming the Inside Institutional Investors actually held 25% of the voting certificates in the relevant trusts, BoNY had no basis to refuse AIG's request for loan files because 25% of the voting certificates had already demanded action on the same trusts. If BoNY was acting at the direction of the Inside Institutional Investors without sufficient voting rights (i.e., the Institutional Investors lacked the requisite 25% of the voting certificates), the Inside Institutional Investors were receiving special treatment which BoNY had refused to extend to its beneficiary AIG.

IV. Serious Legal Issues Must Be Resolved Before The Proposed Settlement Can Even Be Evaluated

34. BoNY's conduct in the face of conflicts of interest (some admitted by it, others not) raises legal issues wholly apart from the ultimate reasonableness or unreasonableness of the proposed settlement.

35. The legal questions include the following:

(1) Should a trustee resolve its conflicts among beneficiaries before siding with one group of beneficiaries to the exclusion and potential detriment of others?

(2) Should a trustee be allowed to negotiate and obtain a release of claims held against it by its trust beneficiaries without the involvement or agreement of all trust beneficiaries?

(3) May a trustee seeking judicial approval of its actions which would extinguish rights and claims of its beneficiaries simultaneously deny beneficiaries access to records in the trustee's possession that the beneficiaries need to evaluate their rights and claims and protect their own interest?

36. AIG, as a trust beneficiary whose rights BoNY may have violated, is entitled to intervene for the purpose of seeking discovery and being heard regarding the conduct of BoNY prior to and during the settlement negotiations.

V. AIG Has Serious Concerns About Whether The Proposed Settlement Is Reasonable

A. The Proposed Settlement Is Presumptively Unreasonable Because BoNY Is An Interested Party And Has Treated Similarly Situated Trust Beneficiaries Differently

37. All of the foregoing undercuts the appearance, if not the reality, of fairness in the proceedings leading to the proposed settlement. There are substantial grounds, moreover, for questioning the substantive as well as the procedural fairness of the proposed settlement.

B. The Factors Limiting The Trusts' Potential Recovery Are Not Supported By The Opinions Proffered By BoNY

38. BoNY submits reports of retained experts to justify a proposed settlement in which the trusts and trust beneficiaries will receive approximately 8% of actual and projected

realized losses as estimated by the Inside Institutional Investors. The bases for these opinions should be fully disclosed and vetted. Even a cursory review of the reports of BoNY's retained experts raises questions about their reliability.

39. First, BoNY proffers the report of Brian Lin opining on the settlement amount. BoNY's reliance on the Lin report is questionable. The underlying methodology of his opinion is built upon layers of questionable assumptions (which must obviously be evaluated) and reliance on data he neither reviewed nor provided. Lin blindly adopted the critical breach and success rate metrics proposed by BAC as opposed to higher rates he says a third party forensic underwriting project revealed. Lin also adopted loss assumptions that are far more favorable to BAC than those the Inside Institutional Investors presented. BAC's figures are derived from experience with different types of loans which are not even at issue here and the Inside Institutional Investors' figures are derived from non-conforming loans (which are). Mr. Lin made this crucial choice despite his finding that certain of BAC's discounts (or "haircuts") "are difficult to validate" while simultaneously finding the Inside Institutional Investors' methodology to be "reasonable." The difference is enormous. Using BAC's metrics, Mr. Lin places damages at $8.8 – 11 billion. The Inside Institutional Investors' methodology, according to Lin, places damages in a range of $27 – 52.6 billion. BoNY has agreed to settle for a sum lower than the low end of its lower calculation. (Query whether it would have done so in the management of its own assets.) These issues have to be fleshed out before the Court can make an informed decision on whether the proposed settlement is reasonable. Mr. Lin's methodology and conclusions should be subject to the same scrutiny as any other expert opinion sought to be used in judicial proceedings, and interested parties should be allowed to offer their own expert opinions.

40. Second, BoNY's retained witness NYU law profession Barry E. Adler gives his legal opinion on the issue of causation under the trust agreements. Specifically, Professor Adler reviewed § 2.03(c) of the at issue trust agreements to opine on the meaning of the phrase "materially and adversely affects the interests of the Certificateholders in that Mortgage Loan." BoNY then uses Professor Adler's legal opinion to explain why such a small percentage recovery is "reasonable." Professor Adler's report cannot reasonably be relied upon to discount BAC's damages because, as Professor Adler points out, there is no one way to view the meaning of the phrase and he makes no prediction on how a court might rule. The parties should develop their evidence, make their arguments, and allow the Court to rule based on a full record.

41. Third, Stanford law professor Robert Daines give his opinion on whether Bank of America should be liable as a successor to Countrywide. With due respect to Professor Daines's opinion, it is only that. While there are many points of contention in Professor Daines's heavily qualified report that AIG and other beneficiaries should have the opportunity to address, there are two important matters he does not speak to at all and which belie his opinion that BAC is unlikely to have successor liability.

a. First, the trust agreements expressly contemplate a merger of Countrywide into another entity and expressly impose on the successor entity the obligations of Countrywide:

> Any Person into which the Depositor or Master Servicer may be merged or consolidated, or any Person resulting from any merger or consolidation, to which the Depositor or the Master Servicer shall be a party, or any person succeeding to the business of the Depositor or Master Servicer, shall be the successor of the Depositor or the Master Servicer, as the case may be . . . .

Ex. 1 § 6.02 (underlines added); *see also id.* § 6.04 (requiring that upon the resignation of the master servicer, no successor master servicer will be appointed until it agrees to assume the

master servicer's "responsibilities, duties, liabilities and obligations"); *id.* Art. I (defining seller, depositor, and master servicer entitles to include successors).

b. BAC confirmed its successor liability in the side letter to BoNY, writing.

> We confirm that we view any actions taken by the Trustee in connection with its entry into the settlement in respect of Mortgage Loan repurchase and other alleged claims against the Sellers and Master Servicer relating to the transactions . . . including but not limited to . . . 'Trustee Settlement Activities' . . . as being actions that, for purposes of the Indemnity [set forth in the trust agreements], relate to the Sale Agreements, the applicable securities, or the performance of the Trustee's duties under the Sale Agreements.
>
> * * *
>
> [W]e confirm that following entry by the Trustee into the Settlement, Bank of America Corporation, BAC Home Loan Servicing, LP, Countrywide Financial Corporation and/or Countrywide Home Loans, Inc. shall pay the reasonable fees and expenses of the Trustee for Trustee Settlement Activities . . . .

Doc. 3, Ex. C [Side Letter] at 2; *see also* Doc. 43 (5 – 6) (stating that BoNY is entitled to indemnity under the governing agreements)

c. Thus, as Professor Daines points out, contractual creditors may protect themselves from limited liability of successor companies by so providing their contracts. The trusts and trust beneficiaries have precisely that protection here. BoNY and BAC cannot treat BAC as a successor for one purpose (to indemnify BoNY) and deny that BAC is a successor for another (to argue against successor liability).

42. Second, beneficiary losses have continued to mount on BAC's watch after it actually assumed Countrywide's responsibilities. Indeed, as Professor Daines notes, the mortgage crisis escalated *after* the merger.

a. As master servicer taking over from Countrywide, BAC has a wide array of duties to trust beneficiaries, which include attempting to remedy payment defaults through foreclosure or other comparable processes, which could include pursuing repurchases (Ex. 1 § 3.11(a)) and "represent[ing] and protect[ing] the interests of the Trust Fund[s] in the same

manner as it protects its own interests in mortgage loans in its own portfolio in any claim, proceeding or litigation regarding a Mortgage Loan" (*id.* § 3.01). *See also* Ex. 2 [October 18, 2010 letter from Gibbs & Bruns to BoNY and BAC] (detailing trust agreement violations of the master servicer).

b. Liability for losses associated with BAC's failure to perform its independent duties to trust beneficiaries after the merger rests squarely on BAC without any successor liability analysis.

43. Lastly, and quite significantly, Professor Daines dramatically minimizes the impact of the decision in *MBIA Ins. Corp. v. Countrywide Home Loans*, No. 602825/08 (Sup. Ct. N.Y. Apr. 29, 2010), *aff'd*, 2011 WL 2567772 (1st Dept. June 30, 2011), which concluded at the motion to dismiss stage that successor liability had been adequately alleged against BAC so as to hold BAC liable for Countrywide's prior bad acts.

C. BoNY's Attempts To Obtain For Itself A Release And To Bind All Trust Beneficiaries With Its Proposed Settlement Fundamentally Taints The Relief It Seeks

44. BoNY cannot bind all trust beneficiaries either to releases of its own potential liability or to the proposed agreement with BAC.

45. First, BoNY has no authority under the trust agreements to impose a release of its own conduct on its beneficiaries, and its attempt to do so contravenes the very notions of fidelity and good faith. *See In re De Planche's Estate*, 65 Misc.2d 501, 502-03 (N.Y. Sur. 1971) (refusing to enforce a trustee's interested transaction).

46. Second, BoNY has pointed to no provision in the trust agreements allowing it to bind trust beneficiaries and prevent them from opting out of the proposed agreement. A trustee derives its powers from the trust agreement. *In re IBJ Schroder Bank & Trust Co.*, 271 A.D.2d at

322; *see* Restatement (Second) of Trusts § 186 (1959). Thus, assuming that the Inside Institutional Investors have the requisite voting rights to compel BoNY to take some action, it does not follow that either the Inside Institutional Investors or BoNY can bind the majority of beneficiaries.

47. The subject trusts give BoNY the right to identify bad loans and demand that Countrywide (and later BAC) repurchase the loans (known as "put-back" rights). These put-back rights are expressly set forth in the trust agreements. Even after widespread irregularities in Countrywide's origination and securitization practices came to light in 2007 and 2008, AIG is unaware of even a single put-back made in an effort to preserve trust assets. BoNY's failures may give rise to direct liability, which would unreasonably be extinguished in this proceeding if the proposed settlement is approved without providing interested parties the opportunity to adequately represent their own interests.

D. The Structure Of The Proposed Settlement Approval Process Fails To Protect All Interested Parties

48. The procedure BoNY has proposed for approval of the settlement provides no opt-out mechanism to an individual trust or trust beneficiary. In fact, there is no way for an individual trust or trust beneficiary to protect its rights other than to object to the settlement. However, as discussed above, BoNY has not revealed what each individual trust and therefore each trust beneficiary can expect to receive from the settlement as the figures are to be calculated after the settlement has been approved. Moreover, BoNY has also failed to reveal important information concerning how the settlement was negotiated and what BoNY considered in deciding to support the settlement.

49. There is evidence that the Inside Institutional Investors were conflicted when negotiating the proposed settlement. For example, BlackRock Financial, an asset manager that is

within the group of the Inside Institutional Investors and was a member of the settlement steering committee, has admitted that it and BAC have a "strategic partnership," and were, at the very time these negotiations were ongoing, concluding a transaction that was "very advantageous for BlackRock and very advantageous for Bank of America." Rollin Affirmation ¶ 5, and Ex. B, thereto (video transcript of CNBC interview, July 20, 2011, of BlackRock CEO Larry Fink). In addition, Bank of America's President of Global Markets is a member of BlackRock's Board of Directors.

50. More curious than Blackrock's close association with BAC, is that counsel for the Inside Institutional Investors will be paid $85 million by BAC, rather than its own clients, if the proposed settlement is finalized. This massive payment from BAC to the Inside Institutional Investors' lawyers suggests an additional conflict in the Inside Institutional Investors' support of the settlement.

51. Recognizing these conflicts BoNY tells the Court that it acted as the fiduciary for all trusts and that the Court should defer to BoNY's reasonable judgment. However, as discussed above, BoNY itself was hopelessly conflicted. Given these conflicts, the Court must strictly scrutinize the proposed settlement.

VI. Request For Relief

52. Under CPLR 401, a party interested in the outcome of an Article 77 proceeding may intervene and participate as a party, including by taking discovery. As demonstrated above, the propriety and scope of BoNY's request for this Court's approval of the proposed settlement agreement is in question. As such, the Court should grant AIG permission to intervene and allow AIG to conduct full discovery into the proposed settlement so that all relevant parties and the Court can make an informed decision as to whether to approve the proposed settlement.

DATED: Denver, Colorado
August 8, 2011

REILLY POZNER LLP

By: _____

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VERIFICATION

I, Michael A. Rollin, hereby affirm under the penalty of perjury that the following is true and correct:

I am a member of the bar of this Court and of Reilly Pozner LLP, attorneys for proposed intervenors. I have read the foregoing Verified Petition and know the contents thereof. All statements of fact therein are true and correct to the best of my knowledge and belief. The grounds of my belief as to all matters not stated upon my knowledge are correspondence and other writings furnished to me by proposed intervenors, publicly available information, and interviews with officers and employees of proposed intervenors. I am making this verification in lieu of a verification by the proposed intervenors because the proposed intervenors are not within the City and County of Denver, Colorado, where Reilly Pozner LLP maintains its offices.

Executed this 8th day of August, 2011, in Denver, Colorado.

_____

Michael A. Rollin